United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, January 5, 2022 **Hearing Room 1568**

10:00 AM
2:20-11634 XLmedica, Inc. **Chapter 11**

#1.00 Hearing re [129] whether re-designation to Subchapter V is warranted

Docket 0

Tentative Ruling:

1/4/2022

Note: Parties must appear by telephone. The courtroom is undergoing renovation. To make a telephonic appearance, parties should contact CourtCall at 888-882-6878 no later than one hour before the hearing.

For the reasons set forth below, the Court declines to allow the Debtor to retroactively elect treatment under Subchapter V. The Debtor's motion to excuse its failure to comply with Subchapter V's 90-day deadline to file a Plan is **DENIED AS MOOT.** EmCyte's Motion to Dismiss is **GRANTED.** The Claim Objection is **DENIED AS MOOT.**

Pleadings Filed and Reviewed:

1) Motion to Dismiss or Convert to Chapter 7:
   a) Motion to Dismiss or Convert to a Chapter 7 Proceeding [Doc. No. 97]
   b) Opposition to Motion to Dismiss or Convert to a Chapter 7 Proceeding [Doc. No. 111]
   c) Reply to Opposition to Motion to Dismiss or Convert to a Chapter 7 Proceeding [Doc. No. 125]
2) Hearing Set By the Court Regarding Re-Designation to Subchapter V:
   a) Order: (1) Setting Hearing to Determine the Appropriateness of Debtor's Re-Designation to Subchapter V and (2) Continuing Hearings on Motion to Dismiss and Claim Objection Pending the Determination of Whether this Case Will Proceed Under Subchapter V [Doc. No. 129]
   b) Debtor's Brief in Support of Re-Designation [Doc. No. 148]
   c) EmCyte Corp.'s Objection to Debtor's Re-Designation as a Small Business Debtor [Doc. No. 152]
3) Debtor's Motion to Excuse Delayed Filing of Plan of Reorganization:
   a) Notice of Motion and Motion to Excuse Delayed Filing of Plan of

10:00 AM
CONT... XLmedica, Inc. **Chapter 11**

Reorganization [Doc. No. 128]

b) EmCyte Corp.'s Response in Opposition to XLMedica, LLC's Motion to Excuse Delayed Filing of Plan of Reorganization [Doc. No. 143]
c) Motion to Strike EmCyte Corp.'s Response and Request for Judicial Notice in Opposition to Motion to Excuse Delayed Filing of Plan of Reorganization [Doc. No. 145]
d) EmCyte Corp.'s Response in Opposition to XLMedica, Inc.'s Motion to Strike EmCyte Corp.'s Response and Request for Judicial Notice in Opposition to Motion to Excuse Delayed Filing of Plan of Reorganization [Doc. No. 150]

4) Claim Objection:
a) Notice of Objection and Debtor's Objection to EmCyte Corp.'s Proof of Claim No. 1 [Doc. No. 103]
b) EmCyte Corp.'s Response in Opposition to XLMedica, LLC's Objection to EmCyte's Proof of Claim No. 1 [Doc. No. 126]
c) Reply to EmCyte Corp.'s Response in Opposition to Debtor's Objection to Proof of Claim No. 1 [Doc. No. 155]

I. Facts and Summary of Pleadings

A. Background

On February 13, 2020 (the "Petition Date"), XLmedica, Inc. (the "Debtor") filed a voluntary Chapter 11 petition. Doc. No. 1 (the "Petition"). On June 2, 2020, upon the motion of EmCyte Corporation ("EmCyte"), the Court lifted the automatic stay to enable EmCyte to proceed with two non-bankruptcy actions against the Debtor. Doc. No. 30 (the "RFS Order"). In one of the actions, pending in the United States District Court for the Middle District of Florida, EmCyte alleges that the Debtor infringed upon EmCyte's intellectual property (the "Infringement Action"). In the other action, pending in a Florida State Court, EmCyte asserts claims for fraudulent inducement, breach of contract, usurpation of corporate opportunities, and misappropriation of trade secrets (the "State Court Action," and together with the Infringement Action, the "Non-Bankruptcy Actions").

The Non-Bankruptcy Actions have been vigorously litigated. On October 21, 2021, the Court awarded Callagy Law, P.C. ("Callagy"), the Debtor's special litigation counsel, fees in the amount of $105,231.00 for services performed representing the Debtor in defending against the Non-Bankruptcy Actions. Doc. No. 115. On November 29, 2021, over EmCyte's opposition, the Court authorized the Debtor to employ Fox Rothschild, LLP ("Fox Rothschild") as its special litigation counsel in

lieu of Callagy. Doc. No. 141 (ruling authorizing employment of Fox Rothschild) and Doc. No. 144 (order authorizing employment of Fox Rothschild).

In the Petition, the Debtor did not check the box indicating that it was a "small business debtor" for purposes of § 101(51D). Petition at § 8. The Small Business Reorganization Act of 2019 (the "SBRA") took effect on February 19, 2020, six days after the Petition Date. On October 21, 2021 (approximately eighteen months subsequent to the Petition Date) the Debtor filed an amended voluntary petition [Doc. No. 119] (the "Amended Petition"), which made two changes to the Petition. First, the Debtor stated that it is a "small business debtor" as defined in § 101(51D). Amended Petition at ¶ 8. Second, the Debtor elected treatment under Subchapter V of Chapter 11. *Id.* Concurrently with the filing of the Amended Petition, the Debtor filed a *Plan of Reorganization* [Doc. No. 110] (the "Plan"). On October 21, 2021, the United States Trustee (the "UST") appointed Gregory K. Jones as the Subchapter V Trustee.

On September 30, 2021, EmCyte filed a motion to dismiss the case [Doc. No. 97] (the "Motion to Dismiss") pursuant to § 1112(b), arguing that the Debtor has failed to make sufficient progress toward reorganization and that to date, the case has primarily benefitted insiders. EmCyte further asserted that the Debtor's attempt to elect treatment under Subchapter V was untimely and in bad faith.

On October 7, 2021, the Debtor filed an objection to EmCyte's Proof of Claim. Doc. No. 103 (the "Claim Objection").

On November 1, 2021, the Court entered an order setting a hearing on whether the Debtor would be permitted to retroactively elect treatment under Subchapter V for January 5, 2022. Doc. No. 129 (the "Subchapter V Procedures Order"). **[Note 1]** Based upon a finding that "[t]his case cannot proceed further until it has been determined whether the Debtor's re-designation to Subchapter V was appropriate," the Court continued the hearings on the Claim Objection and the Motion to Dismiss to January 5, 2022. Subchapter V Procedures Order at ¶ 3.

On December 7, 2021, the Debtor filed a motion seeking to excuse its failure to meet § 1189's requirement that Subchapter V debtors file a Plan within ninety days of the Petition Date.

B. Summary of Papers Filed in Connection with the Motions

1. Motion to Dismiss

EmCyte seeks an order dismissing the case pursuant to § 1112(b), or in the alternative, converting the case to Chapter 7. EmCyte asserts that cause for dismissal

10:00 AM

CONT... XLmedica, Inc. **Chapter 11**

exists under § 1112(b)(4)(A), as a result of "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation." In support of this contention, EmCyte points to the Debtor's Monthly Operating Reports (the "MORs"), which according to EmCyte show that the Debtor lacks sufficient cash flow to support a confirmable Plan. EmCyte further asserts that the sole purpose of the case has been to benefit Ms. Stahl, the Debtor's sole owner.

In opposition to dismissal or conversion, the Debtor disputes EmCyte's contention that its cash flow cannot support a confirmable Plan. The Debtor states that it experienced difficulties in the beginning of the case as a result of the Covid-19 pandemic, but that it has subsequently pivoted its business model to focus on virtual sales and anticipates an improvement in operations.

2. Claim Objection

EmCyte asserts a claim in the amount of $200,000 (the "Claim"). The Claim is based upon EmCyte's causes of action against the Debtor in the Non-Bankruptcy Actions. The Debtor objects to the Claim under § 502(b)(1), on the ground that it is unenforceable against the Debtor under nonbankruptcy law because EmCyte has not yet obtained a judgment in the Non-Bankruptcy Actions.

In opposition to the Claim Objection, EmCyte contends that the Debtor is attempting to circumvent the Court's prior order lifting the stay to permit EmCyte to pursue the Non-Bankruptcy Actions to final judgment. EmCyte emphasizes that if its Claim were to be disallowed solely on the ground that it is unliquidated, the authorization it obtained to litigate the Non-Bankruptcy Actions to final judgment would be effectively nullified. EmCyte attributes the delay in liquidating its Claim to the Debtor's failure to cooperate in good faith with discovery in the Non-Bankruptcy Actions. EmCyte requests that the Court temporarily estimate the Claim for voting purposes if the Claim Objection is not denied in its entirety.

In its Reply to EmCyte's Opposition, the Debtor switches tactics, and argues that the Claim should be estimated for voting and allowance purposes. Debtor "requests that the Court allow for supplemental briefing to determine [and] estimate the amount [of the Claim] for plan purposes." Doc. No. 155 at 4.

3. Appropriateness of Debtor's Re-Designation to Subchapter V

Debtor states that it did not initially elect treatment under Subchapter V because it was not in a position to file a plan shortly after the Petition Date given the uncertainties surrounding litigation of the Non-Bankruptcy Actions. Debtor states that

it seeks re-designation so that a Subchapter V Trustee can assist in mediating the Debtor's disputes with EmCyte.

EmCyte opposes re-designation. It maintains that as a "small business debtor," the Debtor is required to meet the deadlines applicable to "small business cases" under § 1121(e), which have expired and cannot be extended. EmCyte further contends that the Debtor has sought re-designation in bad faith for the purpose of depriving EmCyte of the protections of the absolute priority rule.

Debtor filed a motion seeking to be excused from failing to comply with § 1189, which requires that a plan be filed within 90 days of the Petition Date in a Subchapter V case. In support of that request, Debtor reiterates the arguments that it advances in support of its request to be allowed to proceed under Subchapter V. EmCyte opposes the motion for the same reasons that it opposes the Debtor's request for re-designation. EmCyte also calls attention to findings made by a Florida state court against Emery Smith, one of the Debtor's business partners. According to EmCyte, these findings demonstrate that Ms. Stahl, the Debtor's principal, wrongfully competed against EmCyte. The Debtor moves to strike EmCyte's references to the findings made against Emery Smith, arguing that the information is immaterial, impertinent, and scandalous.

II. Findings of Fact and Conclusions of Law

A. Re-Designation to Subchapter V is Not Appropriate

In *In re Bonert*, 619 B.R. 248 (Bankr. C.D. Cal. 2020), this Court addressed the question of whether a debtor who had sought bankruptcy protection prior to the enactment of the Small Business Reorganization Act of 2019 ("SBRA") should be permitted to amend its petition to elect treatment under Subchapter V. The Court found that re-designation to Subchapter V was appropriate "if not sought in bad faith and provided that no party will be unduly prejudiced." *Bonert*, 619 B.R. at 253.

Before explaining why re-designation is not appropriate, it is necessary for the Court to address an argument advanced by EmCyte that relies upon a misreading of the Bankruptcy Code. EmCyte correctly notes that a debtor cannot elect treatment under Subchapter V unless it also designates itself as a "small business debtor." *See* Interim Bankruptcy Rule 1020(a) ("In a voluntary chapter 11 case, the debtor shall state in the petition whether the debtor is a small business debtor *and, if so, whether the debtor elects to have subchapter V of chapter 11 apply*") (emphasis added). From this correct premise, EmCyte goes on to incorrectly state that the Debtor is subject to the deadlines specified for filing a plan and disclosure statement that apply "[i]n a

10:00 AM

CONT... XLmedica, Inc. **Chapter 11**

small business case." § 1129(e). EmCyte maintains that because it is no longer possible for the Debtor to meet § 1121's deadlines, its request for re-designation must be denied.

EmCyte's argument conflates the terms "small business debtor" and "small business case," and in so doing, rests upon the false premise that a "small business debtor" is bound by the deadlines that § 1121 makes applicable in a "small business case." It is true that a debtor that has elected treatment under Subchapter V is a "small business debtor." However, the case of such a Subchapter V debtor is *not* a "small business case." This is made clear by § 101(51C), which defines "small business case" as "a case filed under chapter 11 of this title in which the debtor is a small business debtor *and has not elected that subchapter V of chapter 11 of this title shall apply*" (emphasis added).

As Bankruptcy Judge Paul W. Bonapfel of the Northern District of Georgia has explained:

> SBRA amended the definition of "small business case" in § 101(51C) to exclude a subchapter V debtor. Thus, a "small business case" is a case in which a small business debtor has *not* elected application of subchapter V. In other words, the case of a sub V debtor is *not* a "small business case," even if the sub V debtor is a "small business debtor." And as a result of the CARES Act amendments increasing the debt limits, a debtor may be a sub V debtor under § 1182(1) (until its expiration), but not a "small business debtor."

Hon. Paul W. Bonapfel, *A Guide to the Small Business Reorganization Act of 2019* (rev'd July 2021), at 19 (available at https://www.alsb.uscourts.gov/sites/alsb/files/bonapfel-sbra-guide--batb-2021.pdf).

Judge Bonapfel's reasoning is echoed in the leading treatise, *Collier on Bankruptcy*:

> Section 1121 does not apply to small business debtors that elect to proceed under subchapter V. Section 1121(e) remains effective as to a "small business case" as defined in section 101(51C). Thus, section 1121(e) would apply to "a case filed under chapter 11 of this title in which the debtor is a small business debtor and has not elected that subchapter V of chapter 11 of this title shall apply."

10:00 AM

CONT... XLmedica, Inc. **Chapter 11**

7 Collier on Bankruptcy ¶ 1121.07 (16th rev'd ed. 2021).

Having disposed of EmCyte's non-meritorious argument regarding the applicability of § 1121's deadlines to Subchapter V debtors, the Court next addresses why redesignation is not warranted. SBRA took effect six days after the Petition Date, yet the Debtor waited approximately eighteen months before seeking re-designation. In cases where re-designation has been approved, the debtors sought re-designation shortly after SBRA's enactment. *See, e.g.*, *In re Body Transit, Inc.*, 613 B.R. 400, 403 (Bankr. E.D. Pa. 2020) (re-designation sought on March 2, 2020, approximately two weeks after SBRA's enactment); *In re Ventura*, 615 B.R. 1, 11 (Bankr. E.D.N.Y. 2020) (re-designation sought on March 3, 2020, approximately two weeks after SBRA's enactment); *In re Bonert*, 619 B.R. 248 (Bankr. C.D. Cal. 2020) (same); *In re Easter*, 623 B.R. 294, 296 (Bankr. N.D. Miss. 2020) (re-designation sought on April 17, 2020, approximately 45 days after SBRA's enactment). The Debtor has cited no authority, and the Court is aware of none, in which a court approved re-designation after a delay of approximately *eighteen months*.

The Debtor has not offered a plausible explanation for the delay. **[Note 2]** The Debtor states that it did not seek re-designation earlier because had it done so, it would have been required to file a "placeholder" plan in view of the uncertain outcome of the Non-Bankruptcy Actions. The Debtor cites *In re Baker*, which held that the plan-filing deadline applicable in Subchapter V cases "is not intended to be manipulated by placeholder plans." 625 B.R. 27, 38 Bankr. S.D. Tex. 2020).

The Debtor's excuse rings hollow because the Plan on file is in fact a "placeholder" plan. The Plan separately classifies EmCyte's Claim, but provides that the treatment of the Claim is "contingent on whether the claimant obtains a monetary judgment(s) against the Debtor." Plan at 12. If EmCyte does obtain a judgment, its Claim will be paid *pro rata* with the other general unsecured creditors, and the payments to those other general unsecured creditors will be recalculated accordingly. "If the recalculated payments make the Plan infeasible, the Debtor will file a motion to reopen to modify its Plan to address feasibility." *Id.* Under the Plan, the treatment of both EmCyte's Claim *and* the claims of other general unsecured creditors are both contingent upon the outcome of the Non-Bankruptcy Actions. A Plan that fails to definitively specify the treatment afforded to the entire body of unsecured creditors cannot reasonably be described as other than a "placeholder" plan.

The more likely explanation for the Debtor's belated request for re-designation is that the Debtor realized its Plan could not be confirmed over EmCyte's opposition unless the Debtor found a way to avoid application of the absolute priority rule.

Subchapter V provided just such an escape hatch, as the absolute priority rule does not apply in Subchapter V provided the plan dedicates the Debtor's projected disposal income over a 3–5 year period to paying creditors. § 1191(c)(1). Where, as here, re-designation is sought to obtain a tactical advantage over an objecting creditor, the request is not made in good faith.

This case is similar to that of *In re Greater Blessed Assurance Apostolic Temple, Inc.*, 624 B.R. 742, 745–46 (Bankr. M.D. Fla. 2020), in which the court refused to permit re-designation, concluding that it was sought only because the debtor was unable to confirm a traditional Chapter 11 plan. The court explained:

> I find the Debtor waited too long to elect to proceed under Subchapter V. All deadlines have passed. No Subchapter V Trustee was timely appointed, which could have been helpful if the Debtor had acted timely.
>
> And Debtor offers no credible reason for its late change of mind. Debtor filed this case only a month before SBRA's effective date. It could have elected to proceed under Subchapter V early on and complied with all the Subchapter V deadlines. Instead, Debtor proceeded under a traditional Chapter 11 case and failed.

Blessed Assurance Apostolic Temple, 624 B.R. at 745–56.

B. The Court Declines to Establish Procedures for the Estimation of EmCyte's Claim

Under § 502(c), the Court is empowered to estimate "any contingent or unliquidated claim" for purposes of distribution, if the fixing or liquidation of such claim "would unduly delay the administration of the case." The court "has wide discretion and latitude in estimating claims." *In re N. Am. Health Care, Inc.*, 544 B.R. 684, 688 (Bankr. C.D. Cal. 2016) (internal citations omitted).

The Court lifted the automatic stay to permit EmCyte to proceed with the Non-Bankruptcy Actions on June 2, 2020. As noted, litigation of the Non-Bankruptcy Actions has been protracted and contentious. Any attempt by this Court to estimate EmCyte's Claim would effectively duplicate the litigation that has already occurred in the Non-Bankruptcy Actions.

Further, estimating the Claim would unfairly prejudice EmCyte, which over the past 18 months has relied upon the RFS Order and the accompanying ruling, which made it clear that the Court was lifting the stay to allow EmCyte to litigate the Non-

Bankruptcy Actions to final judgment:

> The Court finds that the Movant has established a prima facie case that "cause" exists to grant it relief from stay under § 362(d)(1). First and foremost, granting stay relief will promote the interests of judicial economy, while minimizing the risk of piecemeal or redundant litigation as the Movant intends to prosecute its claims against the Co-Defendants in the Non-Bankruptcy Actions. Second, while neither the State Court nor the U.S. District Court are specialized tribunals established specifically to hear Movant's claims, both courts are more intimately familiar with the applicable federal and Florida law to more expeditiously move the Non-Bankruptcy cases to final judgment. Furthermore, having presided over the Non-Bankruptcy cases since fall 2019, both tribunals are more familiar with the parties' disputes. Third, allowing the Movant to litigate the State Court Action will best promote the judicial economy by adjudicating a final judgment as to the underlying claims that may either support or negate the filing of a proof of claim, and/or an adversary complaint.

Doc. No. 29 (the "RFS Ruling") at 7.

Requiring EmCyte to redo the litigation that has already occurred would contravene the reasoning set forth in the RFS Ruling. Doing so would be especially unfair given that the RFS Order is final and was not appealed by the Debtor.

C. EmCyte's Motion to Dismiss the Case is Granted

Section 1112(b) provides that the Court, upon request of a party in interest, "shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate." Section 1112(b)(4) contains a nonexclusive list of factors that constitute cause for dismissal or conversion. The factors set forth in §1112(b)(4) "are not exhaustive, and 'the court will be able to consider other factors as they arise, and to use its equitable powers to reach an appropriate result in individual cases.'" *Pioneer Liquidating Corp. v. United States Trustee (In re Consol. Pioneer Mortg. Entities)*, 248 B.R. 368, 375 (B.A.P. 9th Cir. 2000), *aff'd,* 264 F.3d 803 (9th Cir. 2001).

A "substantial or continuing loss to or diminution of the estate and the absence of

a reasonable likelihood of rehabilitation" constitutes cause for dismissal or conversion. § 1112(b)(4)(A). The first prong—a substantial or continuing loss to or diminution of the estate—may be satisfied by a showing of negative cash flow. *3685 San Fernando Lender, LLC v. Cross Equities, LLC (In re USA Com. Mortg. Co.)*, 452 F. App'x 715, 724 (9th Cir. 2011). The second prong—absence of a reasonable likelihood of rehabilitation—requires an assessment of "whether the debtor's business prospects justify continuance of the reorganization effort." *Hassen Imports P'ship v. City of West Covina (In re Hassen Imports P'ship)*, No. BAP CC-13-1019-KIPAD, 2013 WL 4428508, at *14 (B.A.P. 9th Cir. Aug. 19, 2013). As explained below, the Court finds that both prongs are satisfied.

1. Substantial or Continuing Loss to or Diminution of the Estate

The Debtor's cash flow is negative when considering its litigation expenses, and the only reason that some of the Debtor's Monthly Operating Reports (the "MORs") show positive cash flow is that the Debtor's attorneys have agreed to defer compensation. The Debtor seeks to deflect attention from this reality, asserting that it "has been paying its cost of goods sold and operating expenses as they come due." Doc. No. 111 at 4.

The Debtor's business consists of selling supplies for medical regenerative treatments. The most serious threat to that business consists of EmCyte's allegation that certain of the supplies sold by the Debtor infringe upon EmCyte's trademarks. The Court has already awarded Callagy, the Debtor's special litigation counsel, fees of $105,231.00 to defend the Debtor against these allegations. The Debtor recently retained Fox Rothschild, a prominent (and expensive) firm to replace Callagy. Fox Rothschild's $15,000 retainer was funded by a gift from the sister of the Debtor's principal.

The cost of defending against litigation is a business expense that cannot be disregarded when assessing the Debtor's cash flow. That cost is particular significant here, as the litigation with EmCyte was one of the significant factors precipitating this bankruptcy, and shows no signs of abating anytime soon. The Debtor's dire post-petition cash-flow situation is best exemplified by is Monthly Operating Report for November 2021 (the "Nov. MOR"), which was filed on December 16, 2021. According to the Nov. MOR, the Debtor's post-petition unpaid debt totals $240,414.80, but it has only $13,170.48 in cash-on-hand.

The Debtor's cash flow appears positive in certain of its MORs only because the Debtor is deferring payment of its most significant cost of doing business—the

expenses of the litigation with EmCyte. Such litigation expenses will continue for the foreseeable future and must be considered in any realistic assessment of the Debtor's financial position. When such costs are considered, there is no dispute that the Debtor operates at a loss. The Court finds that this loss is significant enough to satisfy the first prong of § 1112(b)(4)(A).

2. Absence of a Reasonable Likelihood of Rehabilitation

The Debtor asserts that "its business will turn the corner in early 2022" and that its principal, Ms. Stahl, will no longer be required to "devote a considerable time to the litigation [with EmCyte] to the detriment of the business." Doc. No. 111 at 3–4. The Debtor has not provided sufficient evidence to substantiate these optimistic predictions, especially in view of the fact that it has been operating at a significant loss for more than eighteen months. With respect to the litigation, it appears that the demands upon Ms. Stahl's time may only increase over the coming months, given that a trial in the Infringement Action is scheduled to commence in May 2022.

Nor has the Debtor shown how its Plan can be confirmed over EmCyte's opposition. Because the Debtor cannot avail itself of Subchapter V, the absolute priority rule applies. The Plan provides for Ms. Stahl to retain her ownership interest in the Debtor. Class 2(b), which is senior to Ms. Stahl's ownership interest, consists solely of EmCyte's Claim. The amount of that Claim has not been determined but may be as high as $200,000.

The only way for the Plan to be confirmed over EmCyte's opposition would be for Ms. Stahl to contribute "new value" toward the Plan. *See generally Bank of America v. 203 North LaSalle Street Partnership*, 526 U.S. 434 (1999) (describing the new value corollary). To qualify as "new value," the contribution must be "(1) new, (2) substantial, (3) in money or money's worth, (4) necessary for successful reorganization, and (5) reasonably equivalent to the value or interest received." *Liberty Nat'l Enterprises v. Ambanc La Mesa Ltd. P'ship (In re Ambanc La Mesa Ltd. P'ship)*, 115 F.3d 650, 654 (9th Cir. 1997).

Under the terms of Ms. Stahl's recently-confirmed Chapter 13 Plan, all of her disposable income is earmarked toward repaying creditors. There is no indication in the record that Ms. Stahl has the ability to fund a new value contribution.

For these reasons, the Court finds that there is no reasonable likelihood of rehabilitation.

3. Dismissal, as Opposed to Conversion to Chapter 7, is Appropriate

10:00 AM

CONT... XLmedica, Inc. **Chapter 11**

The Court finds that dismissal, as opposed to conversion to Chapter 7 or the appointment of a Chapter 11 Trustee, is in the best interests of creditors. EmCyte is the most significant creditor, and it supports dismissal rather than conversion.

III. Conclusion

Based upon the foregoing, the Court declines to allow the Debtor to retroactively elect treatment under Subchapter V. The Debtor's motion to excuse its failure to comply with Subchapter V's 90-day deadline to file a Plan is **DENIED AS MOOT**. EmCyte's Motion to Dismiss is **GRANTED**. The Claim Objection is **DENIED AS MOOT**.

The Court will prepare and enter appropriate orders.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Landon Foody or Daniel Koontz at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Note 1

As explained in the Subchapter V Procedures Order, under Bankruptcy Rule 1020(b), interested parties have thirty days from the conclusion of the § 341(a) meeting of creditors to object to a debtor's statement that it is a "small business debtor" as defined by § 101(51D). A debtor cannot elect treatment under Subchapter V unless it is also a "small business debtor." The § 341(a) meeting of creditors was scheduled for November 4, 2021, making December 6, 2021 the deadline to object to the Debtor's small-business designation (assuming that the meeting of creditors concluded on November 4, 2021). In view of the possibility that objections to the Debtor's re-designation to Subchapter V could be predicated upon objections to the Debtor's small-business designation, it was necessary for the Court to delay the re-designation hearing to provide parties a sufficient opportunity to object to the Debtor's small-business designation.

Note 2

10:00 AM

CONT... XLmedica, Inc. **Chapter 11**

In opposing Debtor's request to be excused from complying with the deadlines applicable in Subchapter V, EmCyte calls attention to findings made by a state court which, according to EmCyte, show that the Debtor's principal wrongfully competed against EmCyte. Because the Debtor's principal was not a party to the action in which the findings were made, the Court does not consider the findings.

Party Information

Debtor(s):

XLmedica, Inc.	Represented By Matthew D. Resnik Roksana D. Moradi-Brovia

Trustee(s):

Gregory Kent Jones (TR)	Pro Se

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, January 5, 2022 **Hearing Room 1568**

10:00 AM
2:20-11634 XLmedica, Inc. **Chapter 11**

#2.00 Hearing
RE: [103] Motion RE: Objection to Claim Number 1 by Claimant EmCyte Corp.

fr. 11-10-21

Docket 103

Tentative Ruling:

1/4/2022

See Cal. No. 1, above, incorporated in full by reference.

Party Information

Debtor(s):

XLmedica, Inc.

Represented By
Matthew D. Resnik
Roksana D. Moradi-Brovia

10:00 AM
2:20-11634 XLmedica, Inc. **Chapter 11**

#3.00 Hearing
RE: [128] Motion to Excuse Delayed Filing of Plan of Reorganization

fr. 12-7-21

Docket 128

Tentative Ruling:

1/4/2022

See Cal. No. 1, above, incorporated in full by reference.

Party Information

Debtor(s):

XLmedica, Inc.	Represented By Matthew D. Resnik Roksana D. Moradi-Brovia

Trustee(s):

Gregory Kent Jones (TR)	Pro Se

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, January 5, 2022 **Hearing Room 1568**

10:00 AM
2:20-11634 XLmedica, Inc. **Chapter 11**

#4.00 Hearing
RE: [145] Motion to strike Emcyte Corp.s Response in Opposition to Motion to Excuse Delayed Filing of Plan of Reorganization [Docket No. 143] and Request for Judicial Notice in Opposition to Motion to Excuse Delayed Filing of Plan of Reorganization [Docket No. 143-1]

FR. 12-7-21

Docket 145

Tentative Ruling:

1/4/2022

See Cal. No. 1, above, incorporated in full by reference.

Party Information

Debtor(s):

XLmedica, Inc. — Represented By
Matthew D. Resnik
Roksana D. Moradi-Brovia

Trustee(s):

Gregory Kent Jones (TR) — Pro Se

United States Bankruptcy Court
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Judge Ernest Robles, Presiding
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Wednesday, January 5, 2022 **Hearing Room 1568**

10:00 AM
2:20-11634 XLmedica, Inc. **Chapter 11**

#5.00 Hearing
RE: [97] Motion to Dismiss Debtor or Convert to Chapter 7 Proceeding

FR. 11-2-21

Docket 97

Tentative Ruling:

1/4/2022

See Cal. No. 1, above, incorporated in full by reference.

Party Information

Debtor(s):

XLmedica, Inc.

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Matthew D. Resnik
Roksana D. Moradi-Brovia